

DOCKET FILE COPY ORIGINAL
Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 29 2005

Federal Communications Commission
Office of Secretary

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act
of 1991

CG Docket No. 02-278
DA 05-1346

**COMMENTS OF DISCOVER BANK IN SUPPORT OF JOINT PETITION FOR
DECLARATORY RULING**

Discover Bank is pleased to comment in support of the above-referenced petition to the Commission filed by Alliance Contact Services et al. (the "Joint Petition"). Discover Bank joins the Petitioners in urging the Commission to issue a declaratory ruling stating that the Commission has exclusive jurisdiction over interstate telemarketing calls under the Telephone Consumer Protection Act of 1991 (the "TCPA").

Background

Discover Bank, with the issuance of its Discover Card, is among the nation's largest issuers of general-purpose credit cards, as measured by number of accounts and cardholders. Discover Bank also offers deposit account services to customers across the country. Discover Bank, through an affiliate and through unaffiliated telemarketing firms, places telemarketing calls to its current and former customers, as well as to prospective customers.

In its Report and Order of July 3, 2003 the Commission stated that "any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be

No. of Copies rec'd
List ABCDE

0 + 4

preempted.”¹ The Commission directed parties who believe any state law to be inconsistent with section 227 of the TCPA or the TCPA Rules to petition for a declaratory ruling as to the preemption of that state law.²

Discussion

The Communications Act of 1934 specifically reserves authority over interstate communications to the Commission, 47 U.S.C.A. § 152(a), while reserving to the states regulation of intrastate communications, 47 U.S.C.A. § 152(b). The legislative history of the amendments to the Act made by the Telephone Consumer Protection Act of 1991, 47 U.S.C.A. § 227, further indicate a Congressional intent to preclude state laws that regulate interstate communications, while leaving in place state laws that provide greater consumer protection in intrastate communications. *See, e.g.*, House Rep. No. 317, 102d Cong. (1991). The most direct statement this point was made in the Senate by Senator Hollings, then Chairman of the Senate Committee on Commerce, Science and Transportation and the original sponsor and driving force behind the enactment of the TCPA. While explaining the reasoning behind various provisions, Senator Hollings said: "Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding *intrastate* communications except with respect to the technical standards under section 227(d) and subject to section 227(e)2). Pursuant to the general preemptive effect of the Communications Act of 1934, *state regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.*" 137 Cong. Rec. 17,874 (1991) (emphasis added).

¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014, 14064 (2003) ("Report and Order").

² *Id.* at 14064-14065.

There is ample Commission precedent confirming its exclusive jurisdiction over interstate telemarketing calls. In 1991, the Commission issued a release stating that interstate and foreign communications are totally entrusted to the Commission. FCC Release No. 91-185 (1991). Interpretive letters issued by the Commission staff conclude that states have no authority to enact "do-not-call" laws. *See* Letter dated Jan. 26, 1998 from Geraldine A. Matisse, FCC, to Ronald A. Guns, Maryland House of Delegates and letter dated March 3, 1998 from Geraldine A. Matisse, FCC, to Sanford L. Schenberg. The Commission should use this opportunity to reaffirm its exclusive jurisdiction over interstate telemarketing calls.

A clear declaration of the Commission's exclusive jurisdiction is particularly important given the number of state laws that have emerged that are inconsistent with the TCPA Rules. Although there are many, the most significant source of inconsistencies are the state do-not-call registry laws, and the scope of those laws' exemptions for: (i) calls to existing and former customers; (ii) those who have made recent inquiries; and (iii) customers of affiliates. Since the states are required to include numbers from the National Do-Not-Call Registry on their state registries,³ the effect of these inconsistencies is that the federal agencies charged with responsibility for maintaining and enforcing the National Do-Not Call Registry cannot even maintain a uniform set of legal requirements for telemarketers using the Registry.

Indiana, New Jersey and Wisconsin are among the states that have exemptions inconsistent with the TCPA rules. Indiana law contains no exemption for calls to customers, unless the calls are "primarily in connection with an existing debt or contract

³ Report and Order at para. 77.

for which payment or performance has not been completed.”⁴ There is no exemption for calls in response to an inquiry or application, or for affiliate calls. New Jersey law exempts calls in response to an “express written request” of the consumer or “to an existing customer.”⁵ By implication, the exemption does not extend to those who make telephonic, electronic or face-to-face requests for a return call or to former customers, regardless how recent the activity. There is no exemption for calls in response to an inquiry or application. Wisconsin law exempts only calls to a “current client of the person selling the property, goods, or services *that is [sic] the reason for the telephone solicitation.*”⁶ The exemption does not extend to affiliates.⁷ There is no exemption for calls in response to an inquiry or application.

Conclusion

The proliferation of the state do-not-call laws such as those described above and in the Joint Petition is making compliance a complicated and costly endeavor for Discover Bank as it contends with a tangle of overlapping and inconsistent federal and state requirements. This frustrates Congress’ goal of providing a clear, consistent federal regulatory scheme. Discover Bank therefore joins the Petitioners in urging the Commission to issue a declaratory ruling that states lack jurisdiction to regulate interstate telemarketing calls.

Respectfully submitted,

Discover Bank

*by Stefan Daryl
Senior Counsel*

⁴ Ind. Stat. Ann. § 24-4.7(2)

⁵ N.J. Stat. Ann. § 56:8-120.

⁶ Wis. Stat. § 100.52(6)(b) (2002).

⁷ *Id.*

J:\credit marketing\Daily\Regulatory E100\Federal\FCC Comments re TCPA RW200201355\COMMENTS ON PETITIONS FOR DECLARATORY RULING.doc